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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1707

LEROY FRANK COLLIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 493 F. 2d 327.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1974. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to May 15, 1974, and the petition was filed on May 10, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the continuing criminal enterprise statute, 21 U.S.C. 848, is unconstitutionally vague as applied to petitioner.

2. Whether the search warrant affidavit in this case was sufficient to establish probable cause.

3. Whether the search warrant was defective because it failed to name the person or class of persons directed to execute the search.

4. Whether the search exceeded the scope of the warrant.

5. Whether the trial court erred in refusing to order government witnesses, formerly co-conspirators of petitioner, to disclose their current home addresses.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiracy to import cocaine, in violation of 21 U.S.C. 963, engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848, and possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to imprisonment for thirty years on the second count and fifteen years each on the first and third counts, the two fifteen year terms to run consecutively with each other, but concurrently with the thirty year term. The court of appeals affirmed (Pet. App. A).

The case against petitioner included the testimony of four witnesses who stated that during the period alleged in the first two counts of the indictment they had made numerous trips to various locations in South America to bring cocaine into this country for delivery to petitioner. The couriers who testified were Douglas Kapp (Tr. April 19, 1973, 3-245),[1] Cathe Lucas (Tr. April 24, 1973, 2-69; Tr. April 25 to April 26, 1973, 2-47), Brenda Helton

[1] "Tr." followed by a date refers to the transcript of the trial.

(Tr. April 27, 1973, 198-259), and Rochelle Christian (Tr. May 1, 1973, 283 to May 2, 1973, 334).

Douglas Kapp testified that in September, 1971, he took the first of eight or nine trips he made to South America for petitioner. Before Kapp left on his first trip, petitioner instructed him that he was to obtain one kilogram of cocaine, and told him how to verify that the cocaine was of good quality. Petitioner gave Kapp $1,000 to cover his expenses. Kapp obtained the cocaine in South America, returned to Detroit, Michigan, delivered the cocaine to petitioner, and received payment of $1,500 for his efforts (Tr. April 19, 1973, 20-23, 25, 36-38).

Kapp's last trip for petitioner was in May, 1972. Kapp and Cathe Lucas were returning from Columbia, South America, when they were detained by United States Customs officials while passing through customs in Miami, Florida. After customs officials found approximately six pounds of cocaine concealed in girdles which they were wearing, Kapp and Lucas agreed to cooperate with the government. They continued on to Detroit, where Kapp made a prearranged telephone contact with petitioner in order to complete the delivery of the cocaine. That telephone conversation was overheard and recorded by customs agents, who were listening with the consent of Kapp (Tr. April 19, 1973, 112-113, 118, 120-121; Pet. App. A 28; Government's Appendix below 14b-16b).[2]

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[2]Contrary to petitioner's assertion (Pet. 4), the district court did not rule that the customs agents monitored the conversation without Kapp's consent. The court merely noted that Kapp had objected to the tape recording of the conversation, lest petitioner obtain the recording. The court stressed that Kapp himself testified that he had consented to the monitoring of the conversation (Government's Appendix below 14b-15b).

In possession of the information regarding the delivery of the cocaine to petitioner, customs agents, on May 31, 1972, obtained a search warrant for petitioner's residence. On that same day, Cathe Lucas delivered a package containing the cocaine[3] to petitioner at his residence, pursuant to petitioner's instructions to Kapp. The agents then searched the house and recovered the package of cocaine; during the search the agents found an additional eleven pounds of cocaine (Tr. Motion to Suppress 11, 17, 49, 95), as well as scales, spoons, and other narcotics instrumentalities (Pet. App. E 49).

The government also produced evidence relating to the financial element of the continuing criminal enterprise count. For more than one year petitioner systematically imported cocaine, which he purchased for about $5,000 per kilogram and resold for about $20,000 per kilogram (Tr. April 24, 1973, 47). Although petitioner was adjudged a bankrupt in February, 1971, his 1971 income tax return showed an adjusted gross income of $166,750, most of which was listed as "other" miscellaneous income (Tr. May 3, 1973, 476; Government's Appendix below 49b-50b).[4] The evidence also showed that petitioner made large expenditures during mid-1972: he purchased an airplane for $19,5000, made improvements to his residence for $89,000, and purchased three automobiles for $34,500 (Tr. May 3, 1973, 477-478, 495-498, 520-523, 523-528).

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[3]Following the usual procedures in controlled deliveries, customs agents had removed all but about 3 ounces of the cocaine and replaced it with lactose (Tr. Motion to Suppress 49).

[4]"Other" miscellaneous income is that which is not derived from wages, salaries, tips, business income, or capital gains (see Government's Appendix below 49b-50b).

ARGUMENT

1. Petitioner's contention that the continuing criminal enterprise statute, 21 U.S.C. 848, is unconstitutionally vague need not be considered by this Court in light of the concurrent sentences imposed. In any event, it was properly rejected by the district court (Pet. App. B 31-41) and the court of appeals (Pet. App. A 30-31). *United States* v. *Manfredi*, 488 F. 2d 588 (C.A. 2), certiorari denied *sub nom. LaCosa* v. *United States*, No. 73-1215, June 3, 1974; See *United States* v. *Sisca*, petition for a writ of certiorari pending, No. 73-1855.

Under Section 848(b), a person is engaged in a continuing criminal enterprise if:

> (1) he violates any provision of [21 U.S.C. 801, *et seq.* or 21 U.S.C. 951, *et seq.*] the punishment for which is a felony, and
>
> (2) such violation is part of a continuing series of violations of [those provisions] * * * —
>
> > (A) which are undertaken by such person in concert with five or more persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
> >
> > (B) from which such person obtains substantial income or resources.

Prerequisite to conviction under Section 848 is the commission of a series of felonies, each involving specific intent. *United States* v. *Manfredi*, *supra*, 488 F. 2d at 603. Furthermore, the person must be shown to have been in a supervisory position over five or more persons with whom he acted in concert, and he

must obtain substantial income or resources therefrom. Although the terms "continuing series of violations" and "substantial" are not scientifically precise, here, as in *Williams* v. *United States,* 341 U.S. 97, 104, it "strains at technicalities to say that any issue of vagueness * * * as construed and applied is present in the case." What this Court recently stated in *Civil Service Commission* v. *Letter Carriers,* 413 U.S. 548, 578-579, is equally apposite in the instant case:

> [T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. The general class of offenses to which * * * the provisions are directed is plainly within their terms, * * * and they will not be struck down as vague, even though marginal cases could be put where doubts might arise [citation and internal quotes and brackets omitted].

Compare *Broadrick* v. *Oklahoma,* 413 U.S. 601, 607.

Certainly petitioner's conduct falls within the class of conduct proscribed by Section 848, since he was shown to have been the supervisor of an organization which systematically imported large amounts of cocaine from South America for distribution in the United States. Indeed, petitioner does not challenge the statute as applied to him, but argues only that the statute did not warn him of the criminal consequences of his conduct and thus deprived him of due process of law. But "where the punishment imposed

is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from a lack of warning or knowledge that the act which he does is a violation of the law." *Screws* v. *United States*, 325 U.S. 91, 102. Except in a First Amendment context not present here, "one to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker* v. *Levy*, No. 73-206, decided June 19, 1974, slip op., p. 22. See, also, *Broadrick* v. *Oklahoma, supra*, 413 U.S. at 610; *United States* v. *National Dairy Corp.*, 372 U.S. 29, 32-33; *United States* v. *Raines*, 362 U.S. 17, 21. Moreover, as the court stated in *United States* v. *Manfredi, supra*, 488 F. 2d at 603:

> To sustain [appellant's] * * * position would force us to hold that words cannot be devised to make it an offense to engage in the continuous sale and trafficking in heroin with a number of other people and with substantial sums of money changing hands; we feel that not to be the case * * *.[5]

2. Petitioner contends that the search warrant affidavit was insufficient because the affiant stated that petitioner instructed Kapp to deliver cocaine to his residence, whereas petitioner had not used the word "cocaine" in his telephone conversation with Kapp and had not stated his street address. This contention was rejected in the opinion of the court of appeals (Pet. App. A 28-30), upon which we rely. The court stated (*id.* at 29):

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[5]We note that petitioner's extensive quotation from the legislative history of Section 848 (Pet. 10-12) expresses the minority views of only four of some thirty-eight members of the House Committee on Interstate and Foreign Commerce.

> While it is undisputed that Collier did not specifically utter the word "cocaine" or announce his address during the telephone conversation with Kapp, judging from the events leading up to that conversation, we do not feel that these references were erroneous. Rather, they appear to be the only reasonable interpretation of what was said.

3. Petitioner contends that the search warrant was defective because it failed to direct any person or class of persons to execute the warrant. This contention is without merit.

A fair examination of the warrant (Pet. App. D 44) and its accompanying affidavit (Pet. App. C 42) indicates that the clear sense of the documents was that the warrant was to be executed by the affiant, Agent Back, and by other United States Customs agents. Petitioner seeks to void the entire search on the ground that Back's name was inadvertently omitted from the blank space on the printed warrant form following the word "To".[6] Agent Back's name, however, clearly appears on the face of the warrant as the affiant; moreover, following his name and the recitation of the facts constituting probable cause are the words "You are hereby commanded to search forthwith the place named * * * " (Pet. App. D 45). In addition, the affidavit accompanying the warrant expressly states that United States Customs agents will accompany the delivery of the cocaine to petitioner's residence (Pet. App. C 44). Thus, there is no reasonable basis for petitioner's contention that the

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[6]The word "To" and the blank space are omitted in the search warrant as reproduced in the Appendix to the petition (Pet. App. D 44-45).

warrant does not adequately indicate who was to execute it. Under the circumstances the search warrant was not defective and suppression of evidence derived from the search would have been improper. *United States* v. *Soriano*, 482 F. 2d 469, 477-480 (C.A. 5).

4. Petitioner further contends that customs agents exceeded the scope of a lawful search when, after they found the cocaine which was the subject of the controlled delivery, they continued to search for other narcotic drugs and the means and instruments for acquiring, possessing and dispensing same as directed by the search warrant.

The magistrate who issued the search warrant found that there was probable cause to believe that "cocaine and other narcotic drugs and the means and instruments for acquiring, possessing and dispensing same" were being concealed on petitioner's premises, and he directed that the premises be searched and the named property be seized (Pet. App. D 45). The facts in the affidavit provided the magistrate with ample basis for believing that the petitioner was importing cocaine in quantity and informed him that a controlled delivery would be made forthwith to the premises. It was also implicit in the recitation of facts in the affidavit that petitioner would need some means of storing and distributing the cocaine and that instrumentalities therefore would be found on the premises. Similarly, the magistrate could reasonably believe that evidence concerning the means by which petitioner had come into possession of the cocaine would also be found on the premises and that an importer of such a large quantity of cocaine would have additional cocaine or other narcotic drugs on his premises.

The description "cocaine and other narcotic drugs and the means and instrumentalities for acquiring, possessing and dispensing same" in a search warrant is sufficient to permit the seizure of narcotics, scales, and spoons as instrumentalities of the cocaine distribution business. Cf. *United States* v. *Wilson*, 451 F. 2d 209, 214 (C.A. 5), certiorari denied *sub nom. Fairman* v. *United States*, 405 U.S. 1032. Moreover, instrumentalities of a crime may be seized even if they are not described in the warrant under which the search is being conducted. *United States* v. *Alloway*, 397 F. 2d 105, 110-111 (C.A. 6).

5. Petitioner's contention that the trial court committed reversible error in refusing to order government witnesses, who had been petitioner's co-conspirators in the offenses charged, to disclose their current home addresses is without merit. The district court properly refused to order such disclosure out of concern for the witnesses' safety (Pet. App. F 53-54). See *United States* v. *Saletko*, 452 F. 2d 193, 195-196 (C.A. 7), certiorari denied, 405 U.S. 1040; see also *United States* v. *Varelli*, 407 F. 2d 735, 750 (C.A. 7).

Alford v. *United States*, 282 U.S. 687, and *Smith* v. *Illinois*, 390 U.S. 129, cited by petitioner (Pet. 23-26), are inapposite. In *Smith*, the witness, a government informer who was allegedly a narcotics addict, refused to divulge not only his home address, but also his real name. In *Alford* the witness could not be identified either by his occupation at the time

of trial or by his home neighborhood.[7] The Court in those cases was obviously concerned that a defendant might be disadvantaged by the fact that a witness whose personal background was obscure could not be subjected to effective cross-examination. This danger was not present in the instant case where petitioner had known the witnesses for some time and had been recently associated with them in the cocaine smuggling enterprise which was the subject of the prosecution. The only fact not disclosed about the witnesses was their exact home address at the time of the trial. This information would not have aided petitioner in his cross-examination and was withheld from him because of the court's fears for the safety of the witnesses. In *Smith, supra*, 390 U.S. at 133, Mr. Justice White, concurring, noted that questions which would tend to endanger the personal safety of witnesses go beyond the bounds of proper cross-examination.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1974.

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[7]Although in *Alford* the witness was a former employee of the defendant, the opinion does not indicate how well the defendant knew him or how long before trial the witness was in his employ. In the instant case petitioner worked closely with the witnesses less than a year before trial.